TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 726

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

JACOB KATZ AND GEORGE SENN

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED SEPTEMBER 12, 1925

(31449)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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82109—26——1

1 In United States District Court, Eastern District of Pennsylvania

THE UNITED STATES OF AMERICA vs. JACOB KATZ, GEORGE SENN	1123. Dec. Term, 1924

Docket entries

Mar. 6,	1925.	True bill.
" 19,	"	Demurrer filed.
" 19,	"	Motion to quash indictment filed.
" 19,	"	Petition for bill of particulars filed.
" 20,	"	Argued sur demurrer.
Apr. 29,	"	Opinion, Thompson, J., sustaining demurrer and quashing indictment, filed.
July 6,	"	Decree sustaining demurrer, quashing indictment, and allowing exceptions to plaintiff filed.
" 6,	"	Assignment of errors filed.
" 6,	"	Petition for writ of error filed.
" 6,	"	Order of court granting prayer of petition filed.
" 6,	"	Certificate of court filed.
" 6,	"	Writ of error allowed and copy thereof lodged in clerk's office for adverse party.
" 6,	"	Citation allowed and issued.
" 15,	"	Praecipe as to transcript of record filed.
Aug. 18,	"	Citation returned " tarde venit " and filed.
" 19,	"	Alias citation allowed and issued.
" 25,	"	Alias citation returned, served, and filed.

2 In United States District Court

1123

Writ of error

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America, to the Honorable the Judges of the United States District Court for the Eastern District of Pennsylvania, Greeting:

Because in the record, proceedings and judgment in a cause lately pending in the United States District Court for the Eastern District of Pennsylvania between United States of America and Jacob Katz and George Senn, it appears that the said United States of America is entitled to have the said judgment reviewed by the Supreme Court of the United States; and it having presented a petition for a writ of error and an assignment of errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to the parties afore-

said, do command you that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the honorable William Howard Taft, Chief Justice of the United States, the sixth day of July, in the year of our Lord one thousand nine hundred and twenty-five.

[SEAL.] GEORGE BRODBECK,
Clerk of the District Court of United States,
Eastern District of Pennsylvania.

Allowed by—
J. W. THOMPSON,
District Judge.

3 In United States District Court

Indictment

Filed Mar. 6, 1925

FIRST COUNT

Eastern District of Pennsylvania, ss:

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern District of Pennsylvania at the December term of said court in the year 1924, and inquiring for said district, upon their oath present that Jacob Katz and George Senn, hereinafter called defendants, on September 21, 1922, at the city of Philadelphia, in said Eastern District of Pennsylvania, unlawfully and feloniously did conspire, combine, confederate, and agree together to commit an offense against the United States, to wit, the offense on the part of said Jacob Katz of then and there selling, for the Stewart Distilling Company, a corporation under the laws of Maryland, to said George Senn, a large quantity, to wit, two hundred and fifty cases, of Stewart rye whiskey (each of which said cases then and there consisted of twelve quart bottles of said whiskey), without making, at the time of said sale or at any time, a permanent record thereof, showing in detail among other things required by law, the name and address of the person to whom said whiskey then and there was sold as aforesaid, to wit, of said George Senn, or any record except a forged record purporting to show that said whiskey was, at the time and place aforesaid, sold to Thomas A. Ruck, of Reading, Pennsylvania, accompanied by a cashier's check for the

sum of $7,000.00, payable to the order of Thomas A. Ruck, introduced by said defendants for the purpose of apparent corroboration of such supposed sale to Thomas A. Ruck, said forged record and said check being concocted to take the place of the permanent record first above mentioned required by law to be made by said Jacob Katz upon the making of such sale to said George Senn, and intended by said defendants to deceive United States prohibition agents and internal revenue officers engaged in examining such records.

Overt acts

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said conspirators, at the several times and places in that behalf hereinafter mentioned in connection with their names, did do, among many others done by said conspirators, certain acts to effect the object of said unlawful and felonious conspiracy, combination, confederation and agreement: that is to say:

1. Said Jacob Katz, on said September 21, 1922, at Philadelphia aforesaid, in said Eastern District of Pennsylvania, sold said two hundred and fifty cases of said Stewart rye whiskey to said George Senn.

2. Said George Senn, on said September 21, 1922, procured from the Sixth National Bank of Philadelphia aforesaid a cashier's check for the sum of $7,000.00 payable to the order of Thomas A. Ruck.

3. Said Jacob Katz, on said September 21, 1922, wrote his name upon the back of said cashier's check mentioned in overt act No. 2.

Conclusion

And so the grand jurors aforesaid, upon their oath aforesaid, do say that said Jacob Katz and George Senn, at the time and place, and in manner and form, aforesaid, unlawfully and feloniously did conspire to commit an offense against the United States, and did do acts to effect the object of the conspiracy: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

5 SECOND COUNT

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said Jacob Katz and George Senn, defendants, on said September 21, 1922, at Philadelphia aforesaid, in said Eastern District of Pennsylvania, unlawfully and feloniously did conspire, combine, confederate, and agree together to commit another offense against the United States, to wit, the offense on the part of said Jacob Katz of then and there selling, for said Stewart Distilling Company, corporation as aforesaid, to said George Senn, another large quantity, to wit, five hundred cases, of Stewart rye whiskey (each of which last-mentioned cases then and there con-

sisted of twelve quart bottles of said whiskey), without making, at the time of said last-mentioned sale or at any time, a permanent record thereof, showing in detail, among other things required by law, the name and address of the person to whom said last-mentioned whiskey then and there was sold as aforesaid, to wit, of said George Senn, or any record except a forged record purporting to show that that whiskey was, at the time and place aforesaid, sold to the Batchelor Drug Company of Scranton, Pennsylvania, accompanied by a cashier's check for the sum of $14,000.00, payable to the order of A. F. Batchelor, introduced by said defendants for the purpose of apparent corroboration of such supposed sale to the Batchelor Drug Company, said forged record and said check being concocted to take the place of the permanent record in this count of this indictment first above mentioned required by law to be made by said Jacob Katz upon the making of such sale to said George Senn, and intended by said defendants to deceive United States prohibition agents and internal revenue officers engaged in examining such records.

6 Overt acts

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said conspirators, at the several times and places in that behalf hereinafter mentioned in connection with their names, did do, among many others done by said conspirators, certain acts to effect the object of said unlawful and felonious conspiracy, combination, confederation and agreement in this count charged; that is to say:

1. Said Jacob Katz, on said September 21, 1922, at Philadelphia aforesaid, in said Eastern District of Pennsylvania, sold said five hundred cases of said Stewart rye whiskey to said George Senn.

2. Said George Senn, on said September 21, 1922, procured from the Peoples Bank of Philadelphia aforesaid a cashier's check for the sum of $14,000.00 payable to the order of A. F. Batchelor.

3. Said Jacob Katz, on said September 21, 1922, wrote his name upon the back of said cashier's check mentioned in overt act No. 2, appended to this count.

Conclusion

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Jacob Katz and George Senn, at the time and place, and in manner and form, in this count of this indictment aforesaid, unlawfully and feloniously did conspire to commit an offense against the United States, and did do acts to effect the object of the last-mentioned conspiracy: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

(Sgd.) GEORGE W. COLES,
United States Attorney.

8 In United States District Court

[Title omitted.]

Demurrer to indictment

Filed Mar. 19, 1925

The defendants in the above bill of indictment demur to the bill of indictment, because:

1. It is defective in form.
2. It is defective in substance.
3. Because the bill of indictment fails to set forth any crime known to the statutes of the United States.
4. Because the bill of indictment fails to set forth a crime under the statutes of the United States or the common law.

JOHN R. K. SCOTT.
Attorney for Defendants.

9 In United States District Court

[Title omitted.]

Opinion

Filed Apr. 29, 1925

THOMPSON, J.:

In indictment No. 1123 it is charged that the defendants, Katz and Senn, conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Senn 250 cases of whiskey without making the permanent record required under Section 10 of the national prohibition act.

In indictment No. 1124 it is charged that the defendants, Katz and Feuerstein, conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Feuerstein 25 barrels of whiskey without making the permanent record required under Section 10. As the two indictments charge similar offenses in a similar manner, the discussion will be directed only to No. 1123.

Section 10 provides as follows:

"No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons ot whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The
10 commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this act provided."

The objection raised to the indictment is that it does not charge that either Katz or the Stewart Distilling Company held a permit to sell, and that section 10 applies only to those holding permits, and therefore no offense is charged, because, while Congress prohibits in section 6 the sale of liquor without first obtaining a permit from the commissioner, it was not intended by section 10 that a person making a sale, unlawful under section 6, because without a permit, should be charged with the separate offense of making such unlawful sale without making a permanent record thereof showing the details set forth in the section.

The pleader has apparently endeavored, in drafting this indictment, to involve the purchaser with the seller in a conspiracy to sell, but was confronted with the rule of criminal law that where an offense is such that a concert of action between two persons is logically necessary to the completion of the crime, that is to say, the crime cannot take place without concert, a charge of conspiracy against the two persons to commit that crime does not lie. 2 Wharton Criminal Law, section 1339, United States v. Deitrich, 126 Fed. 664; Chadwick v. United States, 141 Fed. 225; Shannon v. Commonwealth, 14 Pa. 226. Section 10 therefore suggested a method of overcoming the difficulties of such a charge by setting up a conspiracy to sell without making a record of the sale. It is well settled that if a person may alone be charged with a crime another, whose concert with him is not necessary for the commission of that crime, may properly be joined with him in an indictment for conspiracy to commit the crime. Chadwick v. United States, supra; United States v. Rhodes, 212 Fed. 513; Tapack v. United States, 220 Fed. 445.

If, therefore, one who does not hold a permit may be charged
11 under section 10 with the failure to make records, another conspiring with him to fail to make the records may be indicted with him.

The question, then, is whether Congress intended to make a violation of section 10 a crime as to one selling liquor, whether or not he held a permit. I fail to see any evidence in the act of any such intention on the part of Congress. Section 6 prohibits selling without first obtaining a permit and prescribes details concerning the time when permits to sell shall expire, the length of time permits to purchase shall be in force, provisions as to what the permits shall specify, and prohibits their issue to persons violating the terms of prior permits. It provides for the prescribing by the commissioner of forms of permits and applications and empowers that official to require bonds, and provides for the review of his decision by a court of equity in the event of a refusal of an application for a permit.

Section 7 provides for permits to physicians.

Section 8 directs the commissioner to cause blanks to be printed and furnished to physicians holding permits and directs the manner in which they shall be used.

Section 9 provides for the citation of those holding permits to appear before the commissioner and authorizes revocation for cause shown.

While section 10 does not describe those who are prohibited from selling without making a record as those holding permits, the final paragraph of that section reads, "The commissioner may prescribe the form of such record which shall be at all times open to inspection as in this act provided," and apparently refers to section 34, providing that all records and reports kept or filed under the provisions of this act shall be subject to inspection by the commissioner or other officers designated and that copies of such records and reports duly certified may be introduced in evidence.

Section 11 requires manufacturers and wholesale or retail
12 druggists to keep as part of the records required of them a copy of all permits to purchase on which sales are made and prohibits them to sell except to persons having permits to purchase.

Without going into further details, sections 12 and 13 are obviously a continuation of the regulatory provisions in relation to those holding permits.

The maxims "ex antecedentibus et consequentibut fit optima interpretatio" and "noscitur a sociis" are to be borne in mind in interpreting a statute, and a penal statute is not to be extended beyond the fair meaning of the language employed. United States v. Baltimore and O. S. W. R. Co., 159 Fed. 33. In that case Judge Severns said:

"A good statement of the doctrine as applied to the case before us is contained in 26 A. and E. Encyc. of L. 616 (2nd Ed.), where it is said:

"'In construing a section of an act, regard must first be had to the language of the clause itself, and, second, to other clauses in the same act, and that construction should be adopted which makes the whole act stand consistently together or reduces the inconsistency to the smallest possible limits.'"

Applying the maxims, and the doctrine thus expressed, I am forced to the conclusion that Congress intended section 10 to apply only to sales by permittees, and did not intend to attempt the impossible; that is, to require those violating the law by selling without permits to make a permanent record of their criminal acts and to punish them for not so doing.

It is argued on the part of the Government that the indictments should stand because of the provisions of section 32, providing that it shall not be necessary in any affidavit, information, or indictment to include any defensive negative averments. But the offense intended to be charged is not subject to an exception which may be stated in the negative. If it is rightly concluded that the offense of failing to make a record is confined to those holding permits, it is a matter of description and not of defensive negative averment,

and if the defendants are to be held it must be because Katz, the seller, is included among those forbidden to sell without
13 making a record. That is, among those holding permits to sell. But there is no averment in the indictment describing Katz as one required to hold a permit, and therefore neither he nor his alleged coconspirator, Senn, are charged with an indictable offense. I think this reasoning is well sustained under the authority of the cases decided under the Harris Antinarcotic Act. Swartz v. United States, 280 Fed. 115; United States v. Carney, 228 Fed. 163; United States v. Wilson, 225 Fed. 82; United States v. Friedman, 224 Fed. 276; United States v. Woods, 224 Fed. 278.

And finally in United States v. Jin Fuey Moy, 241 U. S. 394, it was settled by the Supreme Court in an opinion by Mr. Justice Holmes that an indictment would not lie under section 8 of that act except against those required to register under section 1. The charge in the indictment was a conspiracy of Jin Fuey Moy with Willie Martin to have in Martin's possession narcotic drugs, Martin not being registered with the collector of internal revenue and not having paid the special tax as required under section 1 of the act. Section 8 declares it unlawful for any person who is not registered and has not paid the special tax to have in his possession or control any of the said drugs. Judge Thomson of the Western District of Pennsylvania was sustained in holding the general words "any person" must be confined to the class of persons with whom the act previously had been purporting to deal, that is to say, those producing, importing, manufacturing, compounding, dealing in, dispensing, selling, distributing, or giving away such drugs.

It is concluded that the indictments fail to set forth an indictable offense, and the demurrers are therefore sustained and the indictments quashed.

14 In United States District Court

[Title omitted.]

Order sustaining demurrer

July 6, 1925

Before THOMPSON, J.:

And now, to wit, this 6th day of July, 1925, the above-entitled case having come on for argument upon a demurrer to the indictment on the ground that said indictment did not set forth a crime, and was heard by this court on the 20th day of March, 1925; now, after listening to the argument of counsel for the United States and for the defendant, and having duly considered the same, and being fully advised,

It is ordered that said demurrer be and the same is hereby sustained and the indictment quashed and dismissed to which the plaintiff excepts and the exception is allowed.

(Sgd.) J. W. THOMPSON, *J.*

15 In United States District Court

[Title omitted.]

Petition for writ of error

July 6, 1925

To the Honorable the Judges of the said Court:

The United States of America, plaintiff in the above-entitled cause, feeling itself aggrieved by the order entered herein on the 6th day of July, 1925, sustaining the demurrer to the indictment in said cause and quashing said indictment and dismissing the case on file herein, and in the record and proceedings had in said cause, complains that manifest error was committed to the prejudice of the said United States, all of which is more fully alleged and set forth in the assignments of errors filed herein in aid of, this petition for a writ of error.

Wherefore said plaintiff, United States of America, prays that a writ of error be issued in this behalf to the Supreme Court of the United States in accordance with the provisions of the laws of the United States for the correction of the errors complained of and herewith assigned, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Supreme Court of the United States.

GEORGE W. COLES,
United States Attorney,
Attorney for Petitioner in Error.

16 In United States District Court

[Title omitted.]

Order allowing writ of error

July 6, 1925

The plaintiff, United States of America, having this day filed its petition for a writ of error from the Supreme Court of the United States to review the order entered herein on the 6th day of July, 1925, sustaining the demurrer to the indictment and quashing and dismissing the indictment in this case, together with the assignment of errors specifying matters complained of and of which defendants will complain:

Now, therefore, it is ordered that writ of error be and hereby is allowed for the purpose of review in the Supreme Court of the United States of the said order entered herein.

By the court:

J. W. THOMPSON,
United States District Judge.

17 In United States District Court

[Title omitted.]

Assignments of error

Filed July 6, 1925

Now comes the United States of America, by George W. Coles, United States attorney for the eastern district of Pennsylvania, and says that in the aforesaid proceedings, and in the decision and judgment of said United States District Court for said district sustaining the demurrer of the defendants, there is manifest error in this, that—

1. Said court erred in sustaining said demurrer to said indictment in said cause, based upon a construction of the statutes of the United States upon which said indictment was founded, in holding that there was no statute of the United States making the matters charged in said indictment a crime.

2. Said court erred in giving judgment for said defendants upon the same holding.

Wherefore said United States prays that the aforesaid judgment may be reversed.

GEORGE W. COLES,
United States Attorney,
for the Eastern District of Pennsylvania.

18–19 [Citation in usual form showing service on John R. K. Scott omitted in printing.]

20 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed July 15, 1925

To the Clerk of the District Court for the Eastern District of Pennsylvania:

SIR: You are hereby requested in making up your return to the citation on the writ of error herein to include the following:

Indictment,
Demurrer,
Memorandum decision,
Order sustaining demurrer and quashing indictment,
Petition for writ of error,

Order allowing writ of error,
Assignments of errors,
Writ of error,
Citation,
Praecipe for record,

which includes all the papers, records, and other pleadings necessary to the hearing of the writ of error in the Supreme Court of the United States, and that no other records or pleadings than those above mentioned need be included by the clerk of said court in making up his return to said citation.

GEORGE W. COLES,
United States Attorney,
Attorney for Plaintiff.

21 [Clerk's certificate to foregoing papers omitted in printing.]

22 **In Supreme Court of the United States**

Statement of points to be relied upon and designation by plaintiff in error of parts of record to be printed

Filed Sept. 18, 1925

The plaintiff in error intends to rely upon the contentions that the District Court erred in sustaining, upon the following grounds, the demurrer and motion to quash the indictment:

(1) That the indictment failed to charge a conspiracy to violate section 10 of Title II of the national prohibition act because it failed to allege that the defendant, Jacob Katz, or the Stewart Distilling Company, which he represented, had a permit, issued under the provisions of the national prohibition act or regulations made pursuant thereto, to sell intoxicating liquor.

(2) That section 10 of Title II of the national prohibition act requires the making of a permanent record of the sale of intoxicating liquor only by a person having a permit, issued under the provisions of the national prohibition act or regulations made pursuant thereto, to sell intoxicating liquor.

The plaintiff in error thinks that the entire record as filed will be necessary for the consideration of the claimed errors above enumerated.

WILLIAM D. MITCHELL,
Solicitor General.

SEPT. 16, 1925.

Service of a copy of the foregoing statement of points is hereby acknowledged this —— day of September, 1925.

23 At Philadelphia, in my district, I served a copy of the within statement upon Benjamin M. Golder, Esq., at his office in the Finance Building, and John R. K. Scott, Esq., at his office in

the Lincoln Building, this 22nd day of September, 1925, by handing, to each of said counsel personally, a true and correct copy of the same.

So answers

W. FRANK MATHUES,
United States Marshal.
Per WM. H. CLARK, *Deputy.*

Sworn to and subscribed before me this 22 day of September, A. D. 1925.

[SEAL.] EDGAR GARRETT,
Deputy Clerk, District Court United States,
Eastern District of Pennsylvania.

c [File endorsement omitted.]

d [Endorsement on cover:] File No. 31449. E. Pennsylvania, D. C. U. S. Term No. 726. The United States of America, plaintiff in error, vs. Jacob Katz and George Senn. Filed September 12th, 1925. File No. 31449.

( )

13

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 727

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

JACOB KATZ AND HERMAN FEUERSTEIN

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED SEPTEMBER 12, 1925

(31450)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 727

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

JACOB KATZ AND HERMAN FEUERSTEIN

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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1 In United States District Court, Eastern District of Pennsylvania

THE UNITED STATES OF AMERICA
vs.
JACOB KATZ, HERMAN FEUERSTEIN
1124. December term, 1924

Docket entries

Mar.	6, 1925.	True bill.
"	19, "	Demurrer filed.
"	19, "	Motion to quash indictment filed.
"	19, "	Petition for bill of particulars filed.
"	20, "	Argued sur demurrer.
Apr.	29, "	Opinion, Thompson, J., sustaining demurrer and quashing indictment filed.
July	6, "	Decree sustaining demurrer and quashing indictment and allowing exception to plaintiff filed.
"	6, "	Petition for writ of error filed.
"	6, "	Order of court allowing writ of error filed.
"	6, "	Assignments of error filed.
"	6, "	Certificate of court filed.
"	6, "	Writ of error allowed to U. S. Supreme Court and copy thereof lodged in clerk's office for adverse party.
"	6, "	Citation allowed and issued.
"	15, "	Praecipe as to transcript of record filed.
Aug.	18, "	Citation returned "tarde venit" and filed.
"	19, "	Alias citation allowed and issued.
"	27, "	Alias citation returned served and filed.

2 In United States District Court

Writ of error

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the United States District Court for Eastern District of Pennsylvania, Greeting:

Because in the record, proceedings, and judgment in a cause lately pending in the United States District Court for the Eastern District of Pennsylvania between United States of America and Jacob Katz and Herman Feuerstein it appears that the said United States of America is entitled to have the said judgment reviewed by the Supreme Court of the United States; and its having presented a petition for a writ of error and an assignment of errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to the parties

aforesaid, do command you that under your seal, distinctly and openly, you send the record, proceedings, and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the honorable William Howard Taft, Chief Justice of the United States, the sixth day of July, in the year of our Lord one thousand nine hundred and twenty-five.

[SEAL.] GEORGE BRODBECK,
Clerk of the District Court of United States,
Eastern District of Pennsylvania.

Allowed by—
J. W. THOMPSON,
District Judge.

3 In United States District Court

Indictment

Filed Mar. 6, 1925

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern District of Pennsylvania at the December term of said court in the year 1924, and inquiring for said district, upon their oath present, that Jacob Katz and Herman Feuerstein, hereinafter called defendants, on August 31, 1922, at the city of Philadelphia, in said Eastern District of Pennsylvania, unlawfully and feloniously did conspire, combine, confederate, and agree together to commit an offense against the United States, to wit, the offense on the part of said Jacob Katz of then and there selling, for the Stewart Distilling Company, a corporation under the laws of Maryland, to said Herman Feuerstein a large quantity, to wit, twenty-five barrels, bearing serial numbers as follows:

7586462/3, 4, 5, 6,
7586477/8, 9, 80, 81,
7586485,
7586467/8, 9, 70, 1, 2, 3, 4, 5, 6,
7586482/3, 4,
7586486,

of Stewart Rye Whiskey, without making, at the time of said sale or at any time, a permanent record thereof, showing in detail, among

other things required by law, the name and address of the person to whom said whiskey then and there was sold as aforesaid, to wit, of said Herman Feuerstein, or any record except a forged record purporting to show that said whiskey was, at the time and place aforesaid, sold to the Peerless Drug and Candy Company, of
4 Reading, Pennsylvania, accompanied by a cashier's check for the sum of $7,000.00, payable to the order of Howard Dietrich, introduced by said defendants for the purpose of apparent corroboration of such supposed sale to the Peerless Drug and Candy Company, said forged record and said check being concocted to take the place of the permanent record first above mentioned required by law to be made by said Jacob Katz upon the making of such sale to said Herman Feuerstein, and intended by said defendants to deceive United States prohibition agents and internal revenue officers engaged in examining such records.

OVERT ACT

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said conspirators, at the several times and places in that behalf hereinafter mentioned in connection with their nsmes, did do, among many others done by said conspirators, certain acts to effect the object of said unlawful and felonious conspiracy, combination, confederation, and agreement: that is to say:

1. Said Jacob Katz, on said August 31, 1922, at Philadelphia aforesaid, in said Eastern District of Pennsylvania, sold said twenty-five barrels of said Stewart rye whiskey to said Herman Feuerstein.

2. Said Herman Feuerstein, on said August 31, 1922, procured from the Republic Trust Company, of Philadelphia aforesaid, a cashier's check for the sum of $7,000.00 payable to the order of Howard Dietrich.

3. Said Jacob Katz, on said August 31, 1922, wrote his name upon the back of said cashier's check mentioned in overt act No. 2.

CONCLUSION

And so the grand jurors aforesaid, upon their oath aforesaid, do say that said Jacob Katz and Herman Feuerstein, at the time and place, and in manner and form, aforesaid, unlawfully and feloniously did conspire to commit an offense against the United
5 States, and did do acts to effect the object of the conspiracy: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

(Sgd.) GEORGE W. COLES,
United States Attorney.

[Omitted.]

7 In United States District Court

[Title omitted.]

Demurrer to indictment

Filed Mar. 19, 1925

The defendants in the above bill of indictment demur to the bill of indictment, because:

1. It is defective in form.
2. It is defective in substance.
3. Because the bill of indictment fails to set forth any crime known to the statutes of the United States.
4. Because the bill of indictment fails to set forth a crime under the statutes of the United States or the common law.

JOHN R. K. SCOTT,
Attorney for Defendants.

8 In United States District Court

[Title omitted.]

Opinion

Filed Apr. 29, 1925

THOMPSON, J.:

In indictment No. 1123 it is charged that the defendants, Katz and Senn, conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Senn 250 cases of whiskey without making the permanent record required under section 10 of the national prohibition act.

In indictment No. 1124 it is charged that the defendants, Katz and Feuerstein, conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Feuerstein 25 barrels of whiskey without making the permanent record required under section 10. As the two indictments charge similar offenses in a similar manner, the discussion will be directed only to No. 1123.

Section 10 provides as follows:

"No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The
9 commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this act provided."

The objection raised to the indictment is that it does not charge that either Katz or the Stewart Distilling Company held a permit to sell, and that section 10 applies only to those holding permits, and therefore no offense is charged, because, while Congress prohibits in section 6 the sale of liquor without first obtaining a permit from the commissioner, it was not intended by section 10 that a person making a sale, unlawful under section 6, because without a permit, should be charged with the separate offense of making such unlawful sale without making a permanent record thereof showing the details set forth in the section.

The pleader has apparently endeavored, in drafting this indictment, to involve the purchaser with the seller in a conspiracy to sell, but was confronted with the rule of criminal law that where an offense is such that a concert of action between two persons is logically necessary to the completion of the crime, that is to say, the crime cannot take place without concert, a charge of conspiracy against the two persons to commit that crime does not lie. 2 Wharton Criminal Law, section 1339; United States v. Deitrich, 126 Fed. 664; Chadwick v. United States, 141 Fed. 225; Shannon v. Commonwealth, 14 Pa. 226. Section 10 therefore suggested a method of overcoming the difficulties of such a charge by setting up a conspiracy to sell without making a record of the sale. It is well settled that if a person may alone be charged with a crime another, whose concert with him is not necessary for the commission of that crime, may properly be joined with him in an indictment for conspiracy to commit the crime. Chadwick v. United States, supra; United States v. Rhodes, 212 Fed. 513; Tapack v. United States, 220 Fed. 445.

If, therefore, one who does not hold a permit may be charged under section 10 with the failure to make records, another conspiring with him to fail to make the records may be indicted with him.

The question then is whether Congress intended to make a violation of section 10 a crime as to one selling liquor, whether or not he held a permit. I fail to see any evidence in the act of any such intention on the part of Congress. Section 6 prohibits selling without first obtaining a permit and prescribes details concerning the time when permits to sell shall expire, the length of time permits to purchase shall be in force, provisions as to what the permits shall specify, and prohibits their issue to persons violating the terms of prior permits. It provides for the prescribing by the commissioner of forms of permits and applications and empowers that official to require bonds, and provides for the review of his decision by a court of equity in the event of a refusal of an application for a permit.

Section 7 provides for permits to physicians.

Section 8 directs the commissioner to cause blanks to be printed and furnished to physicians holding permits and directs the manner in which they shall be used.

Section 9 provides for the citation of those holding permits to appear before the commissioner and authorizes revocation for cause shown.

While section 10 does not describe those who are prohibited from selling without making a record as those holding permits, the final paragraph of that section reads, "The commissioner may prescribe the form of such record which shall be at all times open to inspection as in this Act provided," and apparently refers to section 34, providing that all records and reports kept or filed under the provisions of this act shall be subject to inspection by the commissioner or other officers designated and that copies of such records and reports duly certified may be introduced in evidence.

Section 11 requires manufacturers and wholesale or retail
11 druggists to keep as part of the records required of them a copy of all permits to purchase on which sales are made and prohibits them to sell except to persons having permits to purchase.

Without going into further details, sections 12 and 13 are obviously a continuation of the regulatory provisions in relation to those holding permits.

The maxims "ex antecedentibus et consequentibut fit optima interpretatio" and "noscitur a sociis" are to be borne in mind in interpreting a statute, and a penal statute is not to be extended beyond the fair meaning of the language employed. United States v. Baltimore and O. S. W. R. Co., 159 Fed. 33. In that case Judge Severns said:

"A good statement of the doctrine as applied to the case before us is contained in 26 A. and E. Encyc. of L. 616 (2nd Ed.), where it is said:

"'In construing a section of an act, regard must first be had to the language of the clause itself; and, second, to other clauses in the same act, and that construction should be adopted which makes the whole act stand consistently together or reduces the inconsistency to the smallest possible limits.'"

Applying the maxims, and the doctrine thus expressed, I am forced to the conclusion that Congress intended section 10 to apply only to sales by permittees, and did not intend to attempt the impossible, that is, to require those violating the law by selling without permits to make a permanent record of their criminal acts and to punish them for not so doing.

It is argued on the part of the Government that the indictments should stand because of the provisions of section 32, providing that it shall not be necessary in any affidavit, information, or indictment to include any defensive negative averments. But the offense intended to be charged is not subject to an exception which may be stated in the negative. If it is rightly concluded that the offense of failing to make a record is confined to those holding permits, it

is a matter of description and not of defensive negative averment, and if the defendents are to be held it must be because Katz, the seller, is included among those forbidden to sell without making a record; that is, among those holding permits to sell.

12 But there is no averment in the indictment describing Katz as one required to hold a permit, and therefore neither he nor his alleged coconspirator, Senn, are charged with an indictable offense. I think this reasoning is well sustained under the authority of the cases decided under the Harris Antinarcotic Act. Swartz v. United States, 280 Fed. 115; United States v. Carney, 228 Fed. 163; United States v. Wilson, 225 Fed. 82; United States v. Friedman, 224 Fed. 276; United States v. Woods, 224 Fed. 278.

And finally in United States v. Jin Fuey Moy, 241 U. S. 394, it was settled by the Supreme Court in an opinion by Mr. Justice Holmes that an indictment would not lie under section 8 of that act except against those required to register under section 1. The charge in the indictment was a conspiracy of Jin Fuey Moy with Willie Martin to have in Martin's possession narcotic drugs, Martin not being registered with the collector of internal revenue and not having paid the special tax as required under section 1 of the act. Section 8 declares it unlawful for any person who is not registered and has not paid the special tax to have in his possession or control any of the said drugs. Judge Thomson, of the western district of Pennsylvania, was sustained in holding the general words "any person" must be confined to the class of persons with whom the act previously had been purporting to deal; that is to say, those producing, importing, manufacturing, compounding, dealing in, dispensing, selling, distributing, or giving away such drugs.

It is concluded that the indictments fail to set forth an indictable offense, and the demurrers are therefore sustained and the indictments quashed.

13 In United States District Court

[Title omitted.]

Order sustaining demurrer

July 6, 1925

Before THOMPSON, J.:

And now, to wit, this 6th day of July, 1925, the above-entitled case having come on for argument upon a demurrer to the indictment on the ground that said indictment did not set forth a crime, and was heard by this court on the 20th day of March, 1925; now, after listening to the argument of counsel for the United States and for the defendant, and having duly considered the same, and being fully advised,

It is ordered that said demurrer be and the same is hereby sustained and the indictment quashed and dismissed, to which the plaintiff excepts and the exception is allowed.

(Sgd.) J. W. THOMPSON, *J.*

14 In United States District Court

[Title omitted.]

Petition for writ of error

Filed July 6, 1925

To the Honorable the Judges of the said Court:

The United States of America, plaintiff in the above-entitled cause, feeling itself aggrieved by the order entered herein on the 6th day of July, 1925, sustaining the demurrer to the indictment in said cause and quashing said indictment and dismissing the case on file herein, and in the record and proceedings had in said cause, complains that manifest error was committed to the prejudice of the said United States, all of which is more fully alleged and set forth in the assignments of errors filed herein in said of this petition for a writ of error.

Wherefore said plaintiff, United States of America, prays that a writ of error be issued in this behalf to the Supreme Court of the United States in accordance with the provisions of the laws of the United States for the correction of the errors complained of and herewith assigned, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Supreme Court of the United States.

GEORGE W. COLES,
United States Attorney,
Attorney for Petitioner in Error.

15 In United States District Court

[Title omitted.]

Order allowing writ of error

Filed July 6, 1925

The plaintiff, United States of America, having this day filed its petition for a writ of error from the Supreme Court of the United States to review the order entered herein on the 6th day of July, 1925, sustaining the demurrer in the indictment and quashing and dismissing the indictment in this case, together with the assignment of errors specifying the matters complained of and of which defendents will complain;

Now, therefore, it is ordered that writ of error be and hereby is allowed for the purpose of review in the Supreme Court of the United States of the said order entered herein.

By the court:

J. W. THOMPSON,
United States District Judge.

16 In United States District Court

[Title omitted.]

Assignments of error

Filed July 6, 1925

Now comes the United States of America, by George W. Coles, United States attorney for the Eastern District of Pennsylvania, and says that in the aforesaid proceedings, and in the decision and judgment of said United States District Court for said district sustaining the demurrer of the defendents, there is manifest error in this, that—

1. Said court erred in sustaining said demurrer to said indictment in said cause, based upon a construction of the statutes of the United States upon which said indictment was founded, in holding that there was no statute of the United States making the matters charged in said indictment a crime.

2. Said court erred in giving judgment for said defendants upon the same holding.

Wherefore said United States prays that the aforesaid judgment may be reversed.

GEORGE W. COLES,
United States Attorney,
for the Eastern District of Pennsylvania.

17–18 [Citation in usual form showing service on Benjamin M. Golder and John R. Scott omitted in printing.]

19 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed July 15, 1925

To the Clerk of the District Court for the Eastern District of Pennsylvania:

SIR: You are hereby requested in making up your return to the citation on the writ of error herein to include the following:

Indictment,
Demurrer,
Memorandum decision,
Order sustaining demurrer and quashing indictment,
Petition for writ of error,
Order allowing writ of error,
Assignments of errors,
Writ of error,
Citation,
Praecipe for record,

which includes all the papers, records, and other pleadings necessary to the hearing of the writ of error in the Supreme Court of the United States, and that no other records or pleadings than those above mentioned need be included by the clerk of said court in making up his return to said citation.

GEORGE W. COLES,
United States Attorney,
Attorney for Plaintiff.

20 [Certificate to foregoing papers omitted in printing.]

21 In Supreme Court of the United States

Statement of points to be relied upon and designation by plaintiff in error of parts of record to be printed

Filed Sept. 18, 1925

The plaintiff in error intends to rely upon the contentions that the District Court erred in sustaining, upon the following grounds, the demurrer and motion to quash the indictment:

(1) That the indictment failed to charge a conspiracy to violate section 10 of Title II of the national prohibition act because it failed to allege that the defendant, Jacob Katz, or the Stewart Distilling Company, which he represented, had a permit, issued under the provisions of the national prohibition act or regulations made pursuant thereto, to sell intoxicating liquor.

(2) That section 10 of Title II of the national prohibition act requires the making of a permanent record of the sale of intoxicating liquor only by a person having a permit, issued under the provisions of the national prohibition act or regulations made pursuant thereto, to sell intoxicating liquor.

The plaintiff in error thinks that the entire record as filed will be necessary for the consideration of the claimed errors above enumerated.

WILLIAM D. MITCHELL,
Solicitor General.

SEPT. 16, 1925.

Service of a copy of the foregoing statement of points is hereby acknowledged this _____ day of September, 1925.

At Philadelphia, in my district, I served a copy of the within tatement upon Benjamin M. Golder, Esq., at his office in the Finance Building, and John R. K[illegible]cott, Esq., at his office in the Lincoln Building, this 22nd day of September, 1925, by handing, to each f said counsel personally, a true and correct copy of the same.

So answers:

W. FRANK MATHUES,
United States Marshal.
Per W. H. CLARK, *Deputy.*

Sworn to and subscribed before me this 22 day of September, . D. 1925.

[SEAL.]

EDGAR GARRETT,
Deputy Clerk District Court, United States,
Eastern District of Pennsylvania.

File endorsement omitted.

[Endorsed on cover:] File No. 31450. E. Pennsylvania, D. C. U. S. Term No. 727. The United States of America, plaintiff in error, vs. Jacob Katz and Herman Feuerstein. Filed September 12th, 1925. File No. 31450.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1926